Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Joint Petition of BellSouth, SBC and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport	)	

COMMENTS OF THE NEW YORK SATE DEPARTMENT OF PUBLIC SERVICE

Introduction

The New York State Department of Public Service ("NYDPS") submits these comments in response to the Joint Petition of BellSouth, SBC, and Verizon ("petitioners") asking the Federal Communications Commission ("Commission") to find that high-capacity loops and dedicated transport should not be subject to mandatory unbundling requirements.

Petitioners argue that "there is now a vibrant wholesale market for high-capacity loops and dedicated transport" and, thus, they need not be available on an unbundled network element ("UNE") basis. The NYDPS opposes removing these UNEs from the list of elements that must be unbundled by incumbent local exchange carriers ("ILECs"), particularly in New York, because competitors do not have sufficient alternatives to Verizon's high-capacity loops and dedicated transport. Thus, petitioners have not demonstrated that competitors will not be "impaired" without such access.[1]

[1] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98, ¶¶ 30-52 (rel. Nov. 5, 1999)("UNE Remand Order").

I. Verizon Remains the Dominant Provider of High-Capacity Loops in New York

The petitioners suggest that competitors can self-supply high-capacity loops or obtain them from third-parties with no material diminution in their ability to provide services. Petitioners further suggest that non-ILEC high capacity loops are ubiquitously available. The New York Public Service Commission ("NYPSC") recently completed an investigation of Verizon's special services quality of service.[2] Based on the record, the NYPSC determined that, among other things, Verizon remains the dominant provider of facilities for special services in its New York service territory.[3] The record shows that even in lower/midtown Manhattan, Verizon facilities (retail and wholesale) still serve over half of all special service circuits. In upstate New York, Verizon facilities serve almost 90% of such circuits.

Notwithstanding the data presented by petitioners detailing the number of competitors, their aggregate miles of fiber, the number of buildings they pass, or the percentage of the incumbents' revenues at risk, the fact remains that for the majority of customers in New York State the only facilities available to provide high capacity loops in a timely and economical manner belong to Verizon. It is not yet practicable for competitors to obtain high-capacity loops through self-provisioning or from non-ILEC third-parties on an economic basis. Indeed, Verizon itself observes that "[m]any of Verizon's access customers provide franchise service using Verizon's circuits because they have decided it is not economical to build their own infrastructure for that purpose."[4] Thus, a ubiquitous, competitive facilities-based market for special services has not yet emerged in New York, and therefore, petitioners have not established that competitors have meaningful options throughout New York. Accordingly, the Commission's "necessary" and "impaired" standard still requires that high-capacity loops be made available pursuant to §251(c)(3) of the Act.

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[2] Case 00-C-2051, Proceeding to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York, Inc. ("Special Services Proceeding"). Where the majority of special services are non-switched, high-speed data circuits of 1.5 megabits per second and higher transmission rates. Special services include those circuits referred to as high-capacity loops in the instant proceeding.

[3] Letter from Chairman Maureen Helmer of the NYPSC to Chairman Michael Powell dated May 22, 2001.

[4] Special Services Proceeding, comments of Verizon New York, Inc., dated December 15, 2000, p. 12.

II. Verizon Remains the Dominant Provider of Dedicated Transport in New York

Petitioners argue that the Commission's decision to grant pricing flexibility for special access services shows that competitors will not be "impaired" by the elimination of the dedicated transport UNE.[5] However, the Commission's standard for granting pricing flexibility for dedicated transport is not the same as its standard for eliminating a UNE . Pricing flexibility does not require a finding that the UNE is no longer "necessary" and that without it, the competitor will not be "impaired." More specifically, pricing flexibility relief is granted for specific Metropolitan Statistical Areas ("MSAs") upon a showing that competitive "triggers" have been met within each affected MSA.[6] Thus, the presence of sufficient competitive activity in, for example, New York City would trigger a grant of pricing flexibility there, but not in Albany or any other MSA.

In the instant proceeding, however, petitioners suggest that dedicated transport should be removed from the list of elements that must be unbundled nationwide ("delisted") based on the presence of at least one fiber-based collocator in wire centers covering only 30% of the special access revenues in fewer than 60% of the MSAs served by the Bell Operating Companies (BOCs).[7] Presumably, there are no fiber-based collocators in the wire centers covering 70% of the special access revenues in those MSAs. Evidently, there are even fewer such collocators in the other 40% of MSAs served by BOCs and an unmeasured absence of competitive alternatives in the areas served by non-BOC incumbents.

The "delisting" relief sought also differs from the pricing flexibility previously granted in other respects. Unlike "delisting," the Phase II pricing flexibility offered under the Commission's rules is not absolute.[8] While a carrier need not comply with the Commission's price cap and access rate structure rules, it must still offer dedicated transport services under generally available tariffs. This requirement constrains the

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[5] Joint Petition p.19.

[6] In the Fifth Report and Order and Further Notice of Proposed Rulemaking in CC Dockets Nos. 96-262, 94-1, 98-63, and 98-157 (adopted August 5, 1999), the Commission established criteria for granting degrees of pricing flexibility for dedicated transport based upon a showing of competition in the specific MSA, Access Charge Reform and Price Cap Performance Review for Local Exchange Carriers, FCC 99-206 (1999) ¶¶ 77-141.

[7] Joint Petition p.19.

carrier's ability to raise prices in areas of the affected MSA where facilities-based competitive alternatives are not available, even though sufficient competition exists in most parts of the MSA.[9] Additionally, the very availability of transport element UNE in those areas would constrain the carrier's ability to "price gouge" where competitive facilities have not yet been deployed. No similar "safety nets" would exist to protect competition, and ultimately consumers, under the petitioners "delisting" proposal. Indeed, the "delisting"of dedicated transport (and high-capacity loop) UNEs would eliminate one of the "safety nets" that help justify the Commission's pricing flexibility rules in the first instance. In sum, petitioners' suggestion that the triggers for pricing flexibility also justify "delisting" is plainly wrong.

III. The Commission Should Adopt Stringent, Geographically Discrete, Criteria for "Delisting" Unbundled Network Elements

In its *UNE Remand Order,* the Commission evinced a desire to avoid *ad hoc* proceedings to remove UNEs from the national list and expressed its intention to revisit its unbundling rules in three years.[10] In seeking comment on this Joint Petition, the Commission appears to be willing to entertain what could become a long series of *ad hoc* requests for modifications of the national list. Instead, the Commission should establish specific criteria that will be applied to determine that a particular UNE, in specific markets, is no longer "necessary" and/or will not "impair" a competitor's ability to enter the market.

With regard to a standard, the evidence presented in the Joint Petition strongly suggests that competitive alternatives will be available in some areas before others. Consequently, it is likely that individual elements could be appropriately "delisted" in some geographically discrete markets before others. Thus, we would recommend that the Commission establish criteria that contemplate "delisting" of individual UNEs in limited geographical markets, rather than on a nationwide basis. The MSA may be an acceptable size area to consider for certain elements, if relatively stringent criteria are set to ensure near-ubiquitous availability of acceptable options to the ILEC's UNEs. For other

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[8] Access Charge Reform and Price Cap Performance Review for Local Exchange Carriers, FCC 99-206 (1999) at ¶¶ 77-141.
[9] See 47 USC §§ 201, 202 and 208.
[10] UNE Remand Order at ¶¶ 150-152.

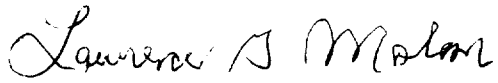
elements, the Commission should consider smaller areas, such as individual wire centers, to increase the likelihood of ubiquitous availability of viable alternatives within the area in which the UNE will be "delisted." For example, it might be reasonable to conclude that competitors would not be impaired by the "delisting" of dedicated transport if 90% or more of the access lines in an MSA were accessible through interoffice transport provided by entities other than the ILEC. Other conditions, such as the ability of alternative carriers to place dark fiber in the ILEC's central offices and to provide CLEC-to-CLEC interconnections in those offices might enable the Commission to set a "trigger" lower than 90%. For other elements, such as high-capacity loops, more narrow criteria may be appropriate, such as a particular percentage of commercial buildings in the MSA (or wire center) being within some specified distance of competitively provided fiber.

In sum, the Commission should consider a broad inquiry into the appropriate triggers for "delisting" UNEs within limited geographical areas.

Conclusion

Verizon remains the dominant provider of special services within its New York service territory. Viable alternatives to ILEC high-capacity loops and dedicated transport are not ubiquitously available. Therefore, the petitioners request that unbundling of those elements no longer be required in New York (and elsewhere) should be denied. The Commission, however, could conduct a proceeding to establish criteria that would justify "delisting" individual UNEs within discrete geographical areas.

Respectfully submitted,



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